UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GC SERVICES LIMITED PARTNERSHIP, a limited partnership, and GC FINANCIAL CORP., a general partner,	)	**Case 28-CA-166389**
and	)	
BRADLEY NELSON, an Individual	)	

BRIEF OF RESPONDENT IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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BRIEF OF RESPONDENT IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent GC Services Limited Partnership and ORG GC GP Buyer, LLC, General Partner ("GC Services") has taken the following exceptions to the Administrative Law Judge's Decision ("ALJD")[1]:

(1) GC Services excepts to the ALJ's unfounded conclusion, which was made without citation to any record evidence or legal authority, that the plain language of the Mutual Agreement for Dispute Resolution ("MADR") explicitly restricts Section 7 activity. [ALJD p. 5, lines 24-25.]

(2) GC Services excepts to the ALJ's failure to recognize that requiring arbitration of claims under the National Labor Relations Act ("NLRA") does not prevent GC Services' employees from filing unfair labor practice ("ULP") charges with the National Labor Relations Board ("Board"). [ALJD p. 5, lines 28-30.]

(3) GC Services excepts to the ALJ's unfounded conclusion, which was made without citation to any record evidence or legal authority, that the MADR provisions requiring arbitration of NLRA claims and preserving the right to file charges with administrative agencies are contradictory and cannot be harmonized. [ALJD p. 6, lines 27-30 & n. 9.]

(4) GC Services excepts to the ALJ's disregard for the undisputed fact that GC Services' employees have continued to file charges with administrative agencies, including the Board, since the MADR was implemented. [ALJD p. 7, lines 14-17.]

(5) GC Services excepts to the ALJ's erroneous claim that none of the cases it cited in its brief to the ALJ involved arbitration agreements that required arbitration of NLRA claims. [ALJD p. 7, n. 13.]

(6) GC Services excepts to the ALJ's unfounded conclusion that her decision does not conflict with the Federal Arbitration Act ("FAA") because the MADR is an illegal contract. [ALJD p. 9, lines 1-4.]

(7) GC Services excepts to the ALJ's unfounded assumption, which was made without citation to any record evidence or legal authority, that the MADR restricts the Board's ability to exercise its discretion under Section 10(a) of the Act. [ALJD p. 8, lines 4-7.]

[1] GC Financial Corp. is no longer GC Services' General Partner, and the Amended Complaint should have been corrected to reflect ORG GC GP Buyer, LLC as the General Partner.

(8) GC Services excepts to the ALJ's inability to articulate or identify any congressional command prohibiting an agreement to arbitrate individual NLRA claims. [ALJD p. 9, lines 16-26.]

(9) GC Services excepts to the ALJ's unfounded conclusion, which was made without citation to any record evidence or legal authority, that arbitration of NLRA claims is unlawful, despite recognizing that it is a regular occurrence in unionized workplaces. [ALJD p. 9, lines 16-26.]

(10) GC Services excepts to the ALJ's misapplication of "contract law" in finding the MADR unlawful, including because she failed to recognize that a primary principle of contract interpretation is that a contract must be read as a whole. [ALJD p. 6, lines 25-26.]

(11) GC Services excepts to the ALJ's refusal to analyze the MADR under the framework established by the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017) because it is the required analytical framework, which the Counsel for the General Counsel ("CGC") has conceded. [ALJD p. 5, n. 5; p. 7, n. 12; CGC Brief to ALJ pp. 9-11 & n. 4.]

(12) GC Services excepts to the ALJ's unfounded decision, which was made without citation to any record evidence or legal authority, not to apply *Boeing* in part because "arbitration contracts . . . are legal documents that are inherently more difficult to interpret [than work rules], rendering objective lay employee analysis misplaced." [ALJD p. 7, n. 12.]

(13) GC Services excepts to the ALJ's conclusion that the "uncertainty" of the MADR requires its language to be interpreted against GC Services as the drafter of the MADR. [ALJD p. 7, lines 7-9.]

(14) GC Services excepts to the ALJ's unfounded conclusions that the MADR prohibits GC Services' employees from filing charges with administrative agencies and that this "encourages an absurd result." [ALJD p. 10, lines 11-12.]

(15) GC Services excepts to the ALJ's unfounded statement that the extension of *Lutheran Heritage* to arbitration agreements is "somewhat of a misfit." [ALJD p. 5, n. 6.]

(16) GC Services excepts to the ALJ's failure to take judicial notice of the CGC's flawed rationale upon which the Amended Complaint was based. [ALJD p. 2, n. 3.]

GC Services' purpose is to focus the Board's attention on the ALJ's flawed analysis and unsustainable findings with respect to the sole issue of whether the MADR unlawfully interferes with Section 7 rights. For the reasons set forth below, the Board should reverse the ALJ's Decision

and Recommended Order and dismiss the Amended Complaint in its entirety because the MADR does not explicitly restrict Section 7 activity and is lawful under *Boeing*.

FACTUAL BACKGROUND

I. THE PARTIES AND PROCEDURAL HISTORY.

GC Services provides customer care and accounts receivable management services for public and private sector organizations. [Joint Motion ¶ 1(p).] GC Services is headquartered in Houston, Texas, but maintains a place of business in Tucson, Arizona, where Charging Party worked. [Joint Motion ¶ 1(o).] On December 18, 2015, Charging Party filed the Charge against GC Services, in which he alleged GC Services violated the NLRA by maintaining an overly broad and coercive employee handbook, discharging him for engaging in protected concerted activity, and forcing employees to waive Section 7 rights as a condition of employment. [Joint Motion ¶ 1(a); Joint Ex. 1(a).] On December 23, 2015, Charging Party filed the First Amended Charge, which was virtually identical to the Charge. [Joint Motion ¶ 1(b); Joint Ex. 1(c).] On March 23, 2016, Charging Party filed the Second Amended Charge, which added an allegation that GC Services also violated Section 8(a)(4) of the Act. [Joint Motion ¶ 1(c); Joint Ex. 1(e).] On March 30, 2016, the Regional Director of Region 28 issued a Complaint alleging GC Services maintained several overly broad and discriminatory work rules and discriminated against Charging Party in violation of the Act. [Joint Motion ¶ 1(d); Joint Ex. 1(g).] On April 20, 2016, GC Services filed its Answer and denied the substantive allegations in the Complaint. [Joint Motion ¶ 1(e); Joint Ex. 1(i).]

On June 17, 2016, the Regional Director of Region 28 issued an Order severing the allegations in paragraphs 4, 5(c)-(h), and 7 of the Complaint. [Joint Motion ¶ 1(g); Joint Ex. 1(l).] On September 26, 2016, the parties filed a Joint Motion and Stipulation of Facts with the Board with respect to the allegations in the Complaint concerning the MADR. [Joint Motion ¶ 1(h); Joint

Ex. 1(n).] On January 9, 2017, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board. [Joint Motion ¶ 1(i); Joint Ex. 1(o).]

Critically, on December 14, 2017, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), in which it invalidated the framework for analyzing facially neutral workplace rules set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Boeing*, the Board also determined its analysis articulated therein should be applied to all pending cases in which it is implicated. *See* 365 NLRB No. 154, slip op. at 17 ("Based on the above standards, we find that it is appropriate to apply the standard we announce today retroactively to the instant case *and to all other pending cases*.") (emphasis added).

On May 21, 2018, the Supreme Court of the United States explicitly ruled in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018) that arbitration agreements requiring individualized arbitration of employment-related disputes, including those based on the NLRA, are enforceable and do not violate the NLRA. [Joint Motion ¶ 1(j).] On October 31, 2018, in light of the *Epic Systems* decision, the Board rescinded the Order that transferred these proceedings to the Board. [Joint Motion ¶ 1(k); Joint Ex. 1(q).] On November 6, 2018, the Regional Director of Region 28 approved the dismissal of the Complaint's allegations regarding the MADR's class action waiver. [Joint Motion ¶ 1(l); Joint Ex. 1(s).]

On November 8, 2018, notwithstanding the FAA, applicable Supreme Court jurisprudence (including *Epic Systems*), and the Board's *Boeing* decision, the Regional Director of Region 28 issued an Amended Complaint alleging the language of the MADR is overly broad and discriminatory.[2] [Joint Motion ¶ 1(m); Joint Ex. 1(u).] On November 21, 2018, GC Services filed

[2] In its Brief to the ALJ, GC Services attached a statement from Region 28 that it was issuing the Amended Complaint based on the Board's decision in *U-Haul Co. of California*, 347 NLRB 375 (2006), to explain why GC Services needed to address the Regional Director's reliance on a case

its Answer, which denied the Amended Complaint's baseless allegations. [Joint Motion ¶ 1(n); Joint Ex. 1(w).] On January 11, 2019, the parties filed a Joint Motion and Stipulation of Facts with the Division of Judges addressing the issues raised by the Amended Complaint. Associate Chief Administrative Law Judge Gerald M. Etchingham granted the Joint Motion and Stipulation of Facts and assigned Administrative Law Judge Ariel L. Sotolongo to preside over this matter. The case was reassigned to Administrative Law Judge Eleanor Laws.

On March 19, 2019, the ALJ issued a Decision and Recommended Order in which she inexplicably declined to analyze the MADR under the Board's *Boeing* decision and instead found the MADR violates the Act because it explicitly restricts Section 7 activity. [ALJD p. 5, lines 24-25 & n. 5.] The ALJ insisted, without any factual or legal basis, that there was "no way to harmonize" the "complete contradiction" of the MADR requiring arbitration of NLRA claims while expressly preserving the right of GC Services' employees to file charges with administrative agencies. [ALJD p. 6, lines 27-30.]

II. GC SERVICES PROVIDES ITS EMPLOYEES WITH AN ALTERNATIVE DISPUTE RESOLUTION PROGRAM.

To facilitate the prompt resolution of employment disputes, GC Services has utilized the MADR since approximately December 15, 2015. [Joint Motion ¶¶ 1(t)-(u); Joint Exs. 2 & 3.] Consistent with applicable law, GC Services provides its employees with the MADR and they electronically acknowledge and agree to its terms through its intranet system. [Joint Motion ¶ 1(v).]

The MADR states in relevant part:

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that applied the now-defunct *Lutheran Heritage* "reasonably construe" standard. Pursuant to Joint Motion ¶ 2, the Board can take judicial notice of Region 28's statements that it was issuing the Amended Complaint based on the *U-Haul* decision. *See, e.g.*, *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1217 (N.D. Cal. 2017) (taking judicial notice of a press release from Attorney General Jeff Sessions).

1. All Disputes Must Be Arbitrated.

It is the intent of the parties hereto that all legally cognizable disputes between them that cannot be resolved to the parties' satisfaction through use of the Company's personnel policies, must be resolved by final and binding arbitration. Claims subject to arbitration include all legally cognizable claims in the broadest context and include, but are not limited to, any dispute about the interpretation, applicability, validity, existence, enforcement, or extent of arbitrability of or under this Agreement, and any claim arising under federal, state, or local statute, regulation, or ordinance, any alleged contract, or under the common law. This includes, by way of non-exhaustive illustration only, any claim of employment discrimination in any alleged form, any claim for wage and hour relief, including under the Fair Labor Standards Act or state or local law, any claim under the Family Medical Leave Act or state or local law or regulation, any claim under the National Labor Relations Act or state or local law or regulation, or any other claim, whether contractual, common-law, statutory, or regulatory arising out of, or in any way related to, Employee's application for employment with and/or employment with Company, the termination thereof, this Agreement, or any other matter incident or in any manner related thereto. It is the intent of the parties that this Agreement shall be construed as broadly as legally possible and shall apply to any and all legally cognizable disputes between them regardless of when the dispute has arisen or may arise and includes any dispute that occurred before or after the parties execute this Agreement as well as disputes that arise or are asserted after Employee leaves the Company's employ, regardless of the reason for separation. This Agreement will apply to all claims, no matter when they accrue, excepting only claims which have already been filed in a court of proper jurisdiction in which both parties are expressly identified by name in such pending lawsuit filed before this Agreement is signed by both parties. **The parties jointly agree neither may file any lawsuit to resolve any dispute between them but Employee may file a complaint with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights.**

[Joint Motion ¶ 1(t); Joint Ex. 2 (emphasis added).]

The GC Services Dispute Resolution Program provision states:

T. GC Services' Dispute Resolution Program

The Company maintains a mandatory mutual dispute resolution program. As a condition and qualification for employment or

> continued employment, all applicants and employees are required to sign and agree to GC Services' Mutual Agreement for Dispute Resolution, which is attached as Attachment D. Should an employee decline to sign and agree to the Mutual Agreement for Dispute Resolution, effective immediately, the Company shall consider the employee to have voluntarily separated his or her employment from GC Services.

[Joint Motion ¶ 1(t); Joint Ex. 3.]

ARGUMENT

I. THE MADR DOES NOT EXPLICITLY RESTRICT SECTION 7 ACTIVITY.

The ALJ's principal, yet unsustainable, conclusion was that the "plain language" of the MADR explicitly restricts Section 7 activity because it expressly requires GC Services' employees to arbitrate "any claim under the National Labor Relations Act." [ALJD p. 5, lines 24-30.] The ALJ failed to support this conclusion with any legal authority – judicial, legislative, administrative, or otherwise – holding that an arbitration agreement that expressly requires employees to arbitrate NLRA claims explicitly restricts Section 7 activity. The ALJ also ignored that the MADR expressly *preserves* the right of GC Services' employees to file charges with administrative agencies and instead relied on purported "common sense." [ALJD p. 6, lines 8-10.] The ALJ further failed to follow binding precedent, which unsurprisingly resulted in a decision riddled with inconsistencies, unsustainable conclusions, and that is plainly incorrect.

A. THE MADR EXPRESSLY PRESERVES THE RIGHT OF GC SERVICES' EMPLOYEES TO FILE ULP CHARGES.

The MADR irrefutably and clearly states that GC Services' employees may file complaints with administrative agencies. Nonetheless, the ALJ concluded that "[i]t is hard to think of a more explicit and direct restriction on employees' rights to invoke the Board's proceedings" than the MADR's provision that "[c]laims subject to arbitration include . . . any claim under the National Labor Relations Act." [ALJD p. 5, lines 28-30.] Nothing about this language, even when read in

isolation from the rest of the MADR, can be reasonably interpreted as prohibiting GC Services' employees from filing ULP charges with the Board. To the contrary, the language requiring arbitration of "any claim under the National Labor Relations Act" does not even address, let alone alter, the right of GC Services' employees to file ULP charges with the Board, as these are two distinct concepts.

When read in its entirety, there is no doubt the MADR promotes, not restricts, the right of GC Services' employees to file ULP charges with the Board. The CGC has stipulated that the MADR expressly states:

> The parties jointly agree neither may file any lawsuit to resolve any dispute between them **but Employee may file a complaint with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights.**

[Joint Motion ¶ 1(t); Joint Ex. 2 (emphasis added).]

This easily understood language assures GC Services' employees that the MADR allows them to file a complaint with ***any*** federal, state, or other administrative agency regarding ***any*** perceived infringement of ***any*** legally protected rights. This assurance eliminates the possibility of GC Services' employees believing that by signing the MADR, they relinquished their right to file ULP charges with the Board. Unlike the cases cited by the CGC, the MADR's language is not legalese that requires knowledge of legal rights and requirements. [CGC Brief to ALJ pp. 11-12.] Indeed, this is borne out by the undisputed evidence (which the ALJ improperly failed to consider) that since the MADR was implemented, GC Services' employees have availed themselves of the administrative process more than 40 times without repercussions of any kind. [Joint Motion ¶¶ 1(w) and (y).] In stark contrast, the CGC has not produced evidence of, and the ALJ could not identify, a single employee who even claims not to have filed a charge because of the MADR. Nor is there any evidence that GC Services has ever invoked the MADR in an attempt to prevent the

filing of a charge, as a defense to a charge, or as an impediment of any kind to administrative proceedings.

Ignoring these dispositive facts, the ALJ concluded "common sense" dictated that "[t]o say employees must arbitrate any claim under the National Labor Relations Act, while at the same time saying employees may file a complaint with any governmental administrative agency is a complete contradiction" and there is "no way to harmonize these provisions without nullifying one of them." [ALJD p. 6, lines 27-30.] That statement improperly and unnecessarily conflates two separate issues: (1) arbitration of NLRA claims, and (2) filing ULP charges with the Board. Significantly, the ALJ could not cite to any legal authority or record evidence to support her conclusion that it is inherently contradictory to require arbitration of NLRA claims while simultaneously preserving employees' right to file ULP charges with the Board. That is because there is no reason those entirely compatible provisions cannot co-exist, as evidenced by the thousands of labor arbitrations that occur each year. Simply put, there is nothing inherently contradictory about requiring employees to arbitrate NLRA claims while also preserving their right to file charges with administrative agencies. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.")

In several recent Board cases with similar facts, then-Member Miscimarra logically noted that arbitration agreements that require arbitration of NLRA claims but expressly preserve employees' right to file ULP charges with the Board are lawful. In *Hobby Lobby Stores*, the Board analyzed an arbitration agreement that required arbitration of NLRA claims but, like the MADR, expressly preserved "the right to file claims with federal, state, or municipal government

agencies." 363 NLRB No. 195, slip op. at 4 (2016) (Member Miscimarra, dissenting). Then-Member Miscimarra concluded that "an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies." *Id.*

Similarly, in *Ralph's Grocery*, the Board analyzed an arbitration agreement that required arbitration of NLRA claims but expressly preserved the right to "fil[e] administrative charges with or obtain[] right to sue notices or letters from federal, state, or local agencies." 363 NLRB No. 128, slip op. at 21 n. 5 (2016). Then-Member Miscimarra clarified that "there is no conflict between (i) an agreement that expressly preserves the right to file NLRB charges, and (ii) having NLRA disputes resolved in arbitration" because "the right to file NLRA charges is not rendered 'illusory' by providing for the submission of NLRA claims to arbitration." *Id.* at 7 (Member Miscimarra, dissenting in part). Then-Member Miscimarra issued similar, persuasive dissenting opinions in other cases. *See, e.g.*, *GameStop Corp.*, 363 NLRB No. 89, slip op. at 5 (2015) (Member Miscimarra, dissenting in part) ("the question of whether an arbitration agreement covers NLRA claims is different from whether or not the Agreement interferes with NLRB charge-filing"); *Applebee's Rest.*, 363 NLRB No. 75, slip op. at 3 (2015) (Member Miscimarra, dissenting in part) ("[n]either does the arbitration of NLRA claims constitute an unlawful restriction on the right to file charges with the Board").

The ALJ's only response to these well-reasoned dissents was an unsuccessful attempt to distinguish them by claiming that "[i]n none of the other cases where the Respondent encourages reliance on the dissent's reasoning does the arbitration agreement at issue say explicitly and with specific statutory reference that employees must arbitrate all of their NLRA claims." [ALJD p. 7,

n. 13.] This distinction is irrelevant because the agreements at issue in those cases, like the MADR, required arbitration of NLRA claims, but preserved the right to file charges with administrative agencies. *See, e.g., Hobby Lobby Stores*, 363 NLRB No. 195, slip op. at 4 (Member Miscimarra, dissenting) ("The Agreement requires arbitration of all employment-related disputes, including those arising under the NLRA."); *Ralph's Grocery*, 363 NLRB No. 128, slip op. at 6 (Member Miscimarra, dissenting in part) ("[The Arbitration Policy] requires arbitration of all employment-related claims, which would encompass claims arising under the NLRA."); *Applebee's Rest.*, 363 NLRB No. 75, slip op. at 3 (Member Miscimarra, dissenting in part) ("The Program broadly requires arbitration of all legal claims, including those arising under the NLRA."). Contrary to her attempted distinction without a difference, the ALJ expressly found that the agreement at issue in *Hobby Lobby* covered NLRA claims. *See* 363 NLRB No. 195, slip op. at 14 ("That this [arbitration agreement] would encompass some claims under the NLRA requires no explanation.").

Undeterred, the ALJ proceeded to ignore that the MADR expressly preserves, not restricts, the right of GC Services' employees to file ULP charges with the Board and issued a clearly erroneous decision that is the proverbial solution in search of a problem. Accordingly, GC Services' exceptions 1-5 require reversal of the ALJ's Decision.

B. THE ALJ'S DECISION CONFLICTS WITH THE FAA, SUPREME COURT PRECEDENT, AND BOARD LAW.

The ALJ's conclusion that the MADR explicitly restricts Section 7 activity because it requires the arbitration of NLRA claims completely disregards the applicable standards and framework for interpreting and potentially invalidating arbitration agreements under the FAA's savings clause, binding Supreme Court precedent, and Board law.

1. The MADR Must Be Enforced As Written.

The FAA states that arbitration agreements like the MADR "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In *Epic Systems*, the Supreme Court made clear that "Congress has instructed that arbitration agreements like those before us must be enforced as written." 138 S. Ct. at 1632. The Supreme Court has further explained that "the overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" and that the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011).

The CGC has acknowledged that the "NLRA and Federal Arbitration Act should [] be read in harmony, and without hostility to arbitration and arbitration agreements entered into by the parties." CGC Brief to ALJ p. 6; CGC Brief on Remand to the Board, p. 4, in *Prime Healthcare Paradise Valley*, Case No. 21-CA-133781 (2018) ("CGC No. 21-CA-133781 Brief").[3] The CGC also has recognized that "[t]he *Epic* majority analysis suggests the Supreme Court will not lightly infer illegality of an FAA-enforceable arbitration contract, and will not apply the concept of protected activity broadly to invalidate an agreed to arbitration agreement." *Id.* The CGC went on to note that "[g]iven no congressional indication that the NLRA supplants the FAA, the [*Epic*]

[3] Pursuant to Joint Motion ¶ 2, the Board may take judicial notice of statements made by the CGC in a brief filed with the Board. *See United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (noting that courts "routinely take judicial notice of information contained on state and federal government websites"); *Roemer Indus., Inc.*, Case No. 08-CA-188055, 2018 WL 4584176, at *23 n. 17 (NLRB Div. of Judges Sept. 24, 2018) (taking judicial notice of information obtained from the NLRB's website); *Cty. of Santa Clara*, 267 F. Supp. 3d at 1217 (taking judicial notice of a press release from Attorney General Jeff Sessions).

Court directed that FAA covered contracts are to be enforced as written, unless clearly unlawful." *Id.*

As written, the MADR expressly and broadly preserves the right of GC Services' employees to "file a complaint with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights." [Joint Motion ¶ 1(t); Joint Ex. 2 (emphasis added).] Moreover, there is no dispute that GC Services' employees have continued to avail themselves of this right since the MADR was implemented without discipline or retaliation. [Joint Motion ¶ 1(w) and (y).] Thus, the MADR should be enforced as written.

2. None of the FAA's Savings Clause's Criteria Apply to the MADR.

Pursuant to Section 2 of the FAA, an arbitration agreement may be deemed invalid only on grounds that exist "for the revocation of any contract," such as "fraud, duress, or unconscionability." *Epic Systems*, 138 S. Ct. at 1622; *Concepcion*, 563 U.S. at 341. The Supreme Court has made clear that arbitration agreements that require arbitration of statutory claims are enforceable "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (citation omitted). In *Epic Systems*, the Supreme Court solidified this requirement and further instructed that establishing illegality is a "heavy burden" because the congressional – not judicial – intention must be "clear and manifest." 138 S. Ct. at 1624. While *Epic Systems* involved class action waivers and the NLRA, the Court's analysis of the broader issue of the interplay between the NLRA and FAA is binding here.

Nonetheless, the ALJ ignored Supreme Court precedent and unsuccessfully attempted to harmonize her decision with the FAA and overcome the "emphatic federal policy" in favor of arbitration. [ALJD p. 9, lines 1-4.] The ALJ's analysis, however, consisted solely of her purported

adherence to contract law principles – which, as set forth below, were misapplied. [ALJD p. 9, lines 1-4.] Indeed, neither the CGC nor the ALJ did or could identify the required congressional command prohibiting an arbitration agreement that requires arbitration of NLRA claims. [ALJD p. 9, lines 16-26.] That is because none exists. Unbound by following the required framework, the ALJ manufactured a finding of illegality premised on an assumption, unsupported by any evidence or legal authority, that the MADR impacts or impedes the Board's ability to exercise its discretion "to prevent any person from engaging in any unfair labor practice" under Section 10(a) of the Act. [ALJD p. 8, lines 4-7.]

In actuality, the MADR does not impede the Board's ability to exercise its discretion under Section 10(a). While the MADR requires GC Services' employees to arbitrate NLRA claims and preserves their right to file ULP charges with the Board, it does not, and could not, limit the Board's discretion to investigate and/or litigate allegations arising out of ULP charges filed by GC Services' employees. *See, e.g.*, *Ralph's Grocery*, 363 NLRB No. 128, slip op. at 7 (Member Miscimarra, dissenting in part) ("Section 10(a) of the Act guarantees that the Board *always* has authority to address and resolve unfair labor practice charges, even though a private agreement may provide for the adjustment or resolution of these claims in arbitration.") (emphasis added).

Moreover, the Supreme Court has found that arbitration agreements requiring individualized arbitration of employment-related disputes are enforceable and do not violate the NLRA. *See Epic Systems*, 138 S. Ct. at 1612; *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1014 (5th Cir. 2015) (arbitration agreement required the parties to "resolve any and all disputes or claims . . . which relate . . . to [employee's] employment . . . by binding arbitration"); *Morris v. Ernst & Young LLP*, Case No. C-12-04964-RMW, 2013 WL 3460052, at *1 (N.D. Cal. July 9, 2013) (arbitration agreement required arbitration of "[a]ll claims, controversies or other disputes . . . that

could otherwise be resolved by a court," including "[c]laims based on federal statutes"). Poignantly, the Supreme Court also noted that Section 7 of the Act "does not express approval or disapproval of arbitration" and "does not even hint at a wish to displace the Arbitration Act – let alone accomplish that much clearly and manifestly, as our precedents demand." *Epic Systems*, 138 S. Ct. at 1625. Furthermore, the Board has found that attacking arbitration agreements on theories that conflict with the Supreme Court's decision in *Epic Systems* must be rejected. *See, e.g., FAA Concord H*, 367 NLRB No. 104, slip op. at 4 n. 3 (2019). Accordingly, the ALJ's Decision must be overturned because it is contrary to binding precedent. *See Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 n. 4 (2017) (reversing the ALJ's decision because he did not apply controlling Board precedent); *Paper Prods. and Misc. Local 27*, 209 NLRB 883 (1974) (reversing the ALJ's decision because it disregarded applicable Supreme Court precedent and dismissing complaint).

3. The Board Has Long Found that Arbitration of NLRA Claims Is Appropriate.

The ALJ's finding that the MADR unlawfully interfered with Section 7 rights also ignores that the Board, which interprets and administers the NLRA, has repeatedly approved of the arbitral process for NLRA claims by deferring ULP charges to arbitration. *See Babcock v. Wilcox Constr. Co., Inc.*, 361 NLRB 1127 (2014); *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Faced with this inconvenient truth, the ALJ again resorted to unfounded conclusions. This time, the ALJ claimed *Babcock* and its predecessors are "fundamentally and crucially different from what the MADR contemplates" because they involved arbitration agreements in collective bargaining agreements, not the "radically different" "individual contracts of adhesion" at issue in this case. [ALJD p. 9, lines 16-26.] First, the ALJ failed to explain how arbitration of NLRA claims by union employees and non-union employees is "radically different," nor is there any evidence in the record to support that claim. Second, this artificial distinction does

not change the irrefutable fact that the Board has long viewed arbitration as an appropriate forum for resolving NLRA disputes. Third, the ALJ's misplaced reliance on unequal bargaining power ignores the Supreme Court's holding that this is insufficient to void arbitration agreements. *See Gilmer*, 500 U.S. at 33. Simply put, the ALJ not only created her own results-driven framework, but then applied it in a manner that ignored the Board's longstanding recognition that NLRA claims can be arbitrated.

4. The ALJ Misapplied Contract Interpretation Principles.

Even assuming *arguendo* that the ALJ could establish her own framework for analyzing the MADR and ignore applicable law (which an ALJ cannot do), her professed reliance on contract interpretation principles does not withstand scrutiny. While correctly noting that specific terms are afforded greater weight than more general terms, the ALJ proceeded to ignore the only language in the MADR that specifically addresses (and promotes) the filing of administrative charges. [ALJD p. 6, lines 33-34; p. 7, lines 1-4.] The ALJ again erred by finding that uncertainty regarding the MADR's language existed when there is no evidence to support that assertion. [ALJD p. 7, lines 7-9.] Rather, the record establishes that GC Services' employees fully understand they can file administrative charges notwithstanding the MADR and have done so. [Joint Motion ¶¶ 1(w) and 1(y).] Also glaringly absent from the ALJ's purported application of "contract law" is any recognition whatsoever that "[a] primary principle of contract construction is that the contract be read as a whole, and that every part therein be interpreted in relation to the entire instrument." *Supreme Sunrise Food Exchange*, 105 NLRB 918, 920 (1953).

Simply put, the ALJ's flawed analysis and failure to read the MADR in its entirely, as it must be, further establishes that the conclusion the MADR explicitly restricts Section 7 activity was clear error for the reasons articulated in exceptions 6-10.

II. THE MADR IS A LAWFUL RULE UNDER THE BOARD'S *BOEING* DECISION.

The MADR should have been analyzed under the framework established by the Board's decision in *Boeing*, which further establishes that it is lawful. Instead, the ALJ ignored the CGC's application of the *Boeing* framework to this case, the CGC's refutation of her basis for disregarding *Boeing*, and contradicted her own statements to avoid analyzing the MADR under *Boeing*. [CGC Brief to ALJ pp. 9-11 & n. 4; ALJD p. 5, n. 5 & 6; p. 6, lines 25-26; p. 7, n. 7.] Thus, the ALJ's Decision should also be reversed for the additional reasons set forth below.

A. THE ALJ ERRONEOUSLY REFUSED TO ANALYZE THE MADR UNDER THE BOARD'S *BOEING* DECISION.

The ALJ declined to apply *Boeing* because "*Boeing* only comes into play for facially neutral documents" and perpetuated the fatally flawed conclusion that the MADR explicitly restricts Section 7 activity, despite its plain language to the contrary. [ALJD p. 5, n. 5; p. 6, lines 25-26.] The ALJ also refused to apply *Boeing* because arbitration agreements "are legal documents that are inherently more difficult to interpret, rendering objective lay employee analysis misplaced." [ALJD p. 7, n. 12.]

The ALJ's professed analysis of the MADR "under contract law" does not permit the disregard of controlling Board precedent. This is particularly the case where, as here, the ALJ's novel and unsupported opinions directly flaunt Board precedent. *See, e.g., Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 n. 4 (reversing the ALJ's decision because he did not apply controlling Board precedent); *Fred Jones Mfg. Co.*, 239 NLRB 54, 54 (1978) (explaining that an ALJ commits error by "substitut[ing] his own view of what the law should be for applicable Board precedent" and that "[i]t is the duty of an Administrative Law Judge to follow and apply established Board precedent, regardless of his personal views").

Contrary to the ALJ's opinion, the *Boeing* decision made clear that the framework set forth therein applies to "work rules, policies and employee handbook provisions," which is exactly what the MADR is. *Boeing*, 365 NLRB No. 154, slip op. at 1. Incredibly, the ALJ ignored *Boeing* despite analyzing the MADR under the Board's prior *Lutheran Heritage* standard and recognizing that "[a]rbitration agreements such as the MADR have been evaluated *under the same legal standards as other work rules*." [ALJD p. 5, lines 4-5; 11-26 (emphasis added).] As the ALJ also acknowledged, the Board has interpreted countless arbitration agreements in recent years under the same analytical framework it applies to other work rules. [ALJD p. 6, n. 8.]; *see, e.g.*, *Hobby Lobby Stores*, 363 NLRB No. 195; *Ralph's Grocery*, 363 NLRB No. 128; *GameStop Corp.*, 363 NLRB No. 89; *Applebee's Rest.*, 363 NLRB No. 75. Furthermore, the ALJ's application of part of *Lutheran Heritage* reveals another inherent contradiction and flaw in her analysis, as she also found that the extension of *Lutheran Heritage* to arbitration agreements was "somewhat of a misfit." [ALJD p. 5, n. 6.] This statement ignores that the CGC issued the Amended Complaint based on the Board's *U-Haul* decision, which analyzed an arbitration agreement under *Lutheran Heritage*. *See supra*, footnote 2. Additionally, the ALJ embarked on this untenable path *sua sponte*, as the CGC expressly noted and rejected the ALJ's rationale. In fact, the CGC's position is that while "*Boeing* (and previously *Lutheran Heritage*) expressly applies to employer-implemented handbook rules and not voluntary agreements, the analysis in Boeing regarding how employees would interpret ambiguous language and how to balance the impact on Section 7 rights with legitimate employer business interests is a useful and appropriate framework for consider the legality of these provisions as well." [CGC Brief to ALJ p. 10, n. 4] Thus, the ALJ was not free to disregard *Boeing* because she subjectively, and without any legal support or evidence, believes "lay employee analysis [is] misplaced" when it comes to arbitration agreements. [ALJD p. 7, n.

12.] Until the Board announces a different standard for evaluating facially neutral arbitration agreements, *Boeing* applies and the ALJ's rejection thereof is sufficient error, in and of itself, to warrant the reversal of her decision.

The ALJ's unjustified refusal to evaluate the MADR under *Boeing* resulted in additional clearly erroneous analysis and conclusions about the MADR. For example, the ALJ claimed that "in cases of uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, i.e. the drafting party." [ALJD p. 7, lines 7-9.] This statement directly contradicts the Board's guidance in *Boeing* that it no longer requires "linguistic perfection" from employers and does not construe ambiguities in facially neutral workplace rules, policies, and handbook provisions against employers. *See Boeing*, 365 NLRB No. 154, slip op. at 10 n. 43.

One of the ALJ's few statements with which GC Services agrees is that "interpreting an arbitration agreement to permit waiver of an employee's right to file Board charges encourages an absurd result" where, as here, the arbitration agreement in question expressly preserves the right to file charges with administrative agencies. [ALJD p. 10, lines 11-12.] The ALJ proceeded to use an example that supposedly supports her finding of illegality that actually establishes the opposite result. According to the ALJ, "employees who are not coerced against this workaround will set the course for dual litigation of the same unfair labor practice claims in arbitration and at the Board." [ALJD p. 10, lines 18-19.] While it is not entirely clear what the ALJ meant by "coerced against this workaround," it is clear the ALJ concluded that employees that are not coerced will find their way to the Board – which is exactly what happened here. Indeed, the Charging Party only pursued his NLRA claims before the Board, which under the ALJ's own hypothetical establishes there was no interference with access to the Board. Accordingly, the ALJ erred by not evaluating the MADR

under the *Boeing* decision and the decision should also be overturned for the reasons set forth in exceptions 11-16.

B. THE MADR IS A LAWFUL CATEGORY 1 RULE.

Applying the correct framework for analyzing the MADR establishes it is a lawful Category 1 rule. Under *Boeing*, the Board now evaluates both the nature and extent of the MADR's potential impact on NLRA rights and GC Services' legitimate justifications associated with the MADR and then assigns the MADR to one of three categories to all cases pending when *Boeing* was decided. A Category 1 rule is lawful to maintain, either because, when reasonably interpreted, it does not prohibit or interfere with the exercise of Section 7 rights, or the potential adverse impact on protected rights is outweighed by legitimate justifications associated with the rule. *See Boeing*, 365 NLRB No. 154, slip op. at 15. A Category 2 rule is lawful to maintain if, after undergoing "individualized scrutiny," it would not prohibit or interfere with Section 7 rights. *See id.* The MADR is a lawful Category 1 rule because it does not prohibit or interfere with the exercise of NLRA rights and because any potential adverse impact on protected rights is outweighed by legitimate justifications associated with the MADR. *See id.* at 15.

Taking the justification prong first, there is no question employers have legitimate and important reasons for maintaining arbitration programs. Congress and the Supreme Court have long stated as much and recently reaffirmed this well-established principle. *See* 9 U.S.C. § 1 *et seq.*; *see also, e.g.*, *Epic Systems*, 138 S. Ct. at 1620; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). The CGC did not, and cannot, dispute that the arbitration of employment disputes arising under the NLRA is the nearly universal default dispute mechanism in unionized settings. Nor did the CGC dispute that the Board regularly finds arbitration to be the appropriate forum for resolution of NLRA claims, even when a union or employer elects to file ULP charges with the Board. As a result, there is no basis from which to conclude that GC Services' legitimate interests

for the MADR are outweighed by a completely speculative and nonexistent impact on Section 7 rights.

In actuality, the MADR advances, not interferes with, Section 7 rights in a clear and succinct manner *in the first paragraph* of a two-page agreement. [Joint Ex. 2.] In fact, this case presents precisely the situation the CGC has acknowledged constitutes a Category 1 rule. *See* CGC Brief to ALJ p. 10 ("*Epic* dictates that an arbitration agreement should be enforced unless it is clearly in conflict with the NLRA. Thus, if an agreement does not clearly interfere with or prohibit NLRA-protected activities, the rule is lawful" (internal quotations omitted); CGC No. 21-CA-133781 Brief, p. 5 ("an arbitration provision that requires that employment related claims be resolved by arbitration, but which does not prohibit the filing of an unfair labor practice charge, would be a lawful Category 1 rule under *Boeing* because no interference with any NLRA rights is implicated").

The only way to conclude an employee would interpret the MADR as interfering with his or her right to file a ULP charge with the Board is to disregard plain language and then assume, without any supporting evidence, that employees could not understand the MADR. As the Fifth Circuit explained in *Murphy Oil* (which was affirmed by the Supreme Court in *Epic Systems*), "it would be unreasonable for an employee to construe [an arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite." 808 F.3d at 1020; *see also Hobby Lobby Stores*, 363 NLRB No. 195, slip op. at 4 (Member Miscimarra, dissenting) ("an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board, or more generally, with administrative agencies"); *Applebee's Rest.*, 363 NLRB No. 75, slip op. at 2 (Member Miscimarra, dissenting in part) (an

arbitration agreement that explicitly states that it does not prevent employees "from filing a charge with any state or federal administrative agency" did not prohibit or interfere with NLRB charge-filing). In sum, analysis of the MADR under the *Boeing* framework establishes it is a lawful Category 1 rule and the ALJ's failure to do so constitutes reversible error.

C. AT A MINIMUM, THE MADR IS A LAWFUL CATEGORY 2 RULE.

Even if the MADR were to be improperly categorized as a Category 2 rule instead of a Category 1 rule, it is still lawful under *Boeing*. As outlined above, a Category 2 rule is one that warrants individualized scrutiny in each case to determine whether the rule would prohibit or interfere with NLRA rights. *See Boeing*, 365 NLRB No. 154, slip op. at 15.

Here, the evidence clearly demonstrates that GC Services' employees fully understand the MADR does not interfere with their right to file charges with administrative agencies. There is no dispute that the Charging Party successfully filed a charge and two amended charges with the Board, and GC Services' employees filed 41 charges or complaints with various federal, state, and local administrative agencies between the MADR's implementation and the filing of the stipulated record. [Joint Motion ¶ 1(y).] This is not surprising because the plain language of the MADR explicitly assures employees that although they must arbitrate any employment-related disputes, they can still file charges with administrative agencies. *See Ralph's Grocery*, 363 NLRB No. 128, slip op. at 8 (Member Miscimarra, dissenting in part) ("the right to file NLRB charges is not rendered 'illusory' by providing for the submission of NLRA claims to arbitration"). Accordingly, even individualized scrutiny of the MADR establishes that it is a lawful rule.

CONCLUSION

For the reasons set forth above, the Board should reverse the ALJ's Decision and Recommended Order and dismiss the Amended Complaint in its entirety.

Dated: April 15, 2019

Respectfully submitted,

/s/ Christopher J. Meister

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 15, 2019 a copy of the foregoing BRIEF OF RESPONDENT IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION has been filed via electronic filing with:

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and COPY served via electronic mail to:

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